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COMMANDER'S LEGAL GUIDE

DEPARTMENT OF THE ARMY
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Legal Services
Administrative and Uniform Code of Military Justice

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1. **PURPOSE.** To furnish a pamphlet to commanders that provides an overview of the various administrative and Uniform Code of Military Justice options available to them in resolving military personnel problems.

2. **REFERENCES.** Required publications and forms are outlined in appendix A.

3. **EXPLANATION OF TERMS.** Acronyms used in the pamphlet are explained in the Glossary

CHAPTER 1

INTRODUCTION TO MILITARY CRIMINAL AND ADMINISTRATIVE PERSONNEL LAW.

1-1. **INTRODUCTION.** This pamphlet will provide commanders at all levels with an overview of the various administrative and Uniform Code of Military Justice (UCMJ) options available to them in resolving military personnel problems. It is not intended to be a detailed text replacing applicable Army regulations. It is intended to provide quick information in a succinct format with references to policies, practices, and procedures in the area of personnel, disciplinary, and administrative actions. Commanders should freely seek legal advice from their trial counsel. For administrative actions applicable to civilian employees, commanders should contact the Civilian Personnel Advisory Center (CPAC).

1-2. COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM

a. Commanders play a major role in the military justice system by setting policies and enforcing discipline within their units. Leadership techniques, reinforced by a strong Noncommissioned Officer (NCO) Corps, provides a majority of the means necessary to enforce discipline. However, sometimes it is necessary to use punitive measures, such as trial by court-martial, or punishment under Article 15, UCMJ.

b. The quality of typical soldiers in the Army today is high. However, a handful of problem soldiers continue to occupy a significant amount of the command's time. Some soldiers cannot, or will not, perform their duties effectively. The first step must be an attempt to motivate the soldier, assist in solving his problems, and ensure the chain of command is responding to his legitimate needs. Leadership is still the best cure. Immediate or hasty separation is often wasteful or unfair to the soldier, and the Army. However, if reasonable, conscientious attempts towards rehabilitation fail, various elimination actions are available.

c. There are many administrative options available to assist the commander in handling a nonproductive soldier. This arsenal of options ranges from the relatively moderate rehabilitative tools described in chapter 2 of this pamphlet, through more severe actions in chapters 3 and 4, to the most drastic administrative action available to the commander, separation of the soldier from the Army. Unless indicated otherwise, the information provided in this pamphlet is applicable to all soldiers, enlisted and officers alike. Additionally, references to officers include warrant

officers, unless specifically stated otherwise.

(1) Disciplinary problems. Commanders have many methods available to deal with disciplinary problems. These include informal counseling and extra training through the full range of administrative options such as withdrawal or limitation of privileges, to administrative discharges, punishment under Article 15, UCMJ, and trial by court-martial.

(2) Prosecutorial discretion. In the Army, unlike in the civilian sector, the commander decides whether a case will be resolved administratively, or referred to trial, and what the charges will be. The Manual for Courts-Martial (MCM) gives little guidance in exercising this discretion, except in mandating that cases be resolved at the lowest possible level consistent with the seriousness of the offense. Although advice can be sought from the Staff Judge Advocate (SJA) and trial counsel, the chain of command must decide whether prosecution is warranted. In the case of minor incidents, the commander, exercising prosecutorial discretion, should first decide that none of the varied administrative measures is sufficient before resorting to punitive options.

(a) The decision to refer offenses to trial by court-martial is difficult, and can be made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to "do something." Congressional inquiries and expressions of interest from superior commanders tempt some to refer cases to trial to settle the matter. A case should never be referred to trial unless the convening authority is personally satisfied, by legal and competent evidence, that there is probable cause to believe that the accused is guilty and should be punished. On the other hand, a commander may find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, the interests of justice, or other considerations, the accused should not be punished under Article 15 or by trial by court-martial.

(b) The commander must exercise reasoned judgment when confronted with a military justice problem. Always keep in mind that military justice is only one way of promoting discipline; it is a tool of leadership, but not the only tool. While discretion in many of these areas rests with the commander, legal advice can and should be sought from the supporting trial counsel.

1-3. COMMAND INFLUENCE.

a. Article 37, UCMJ, and Rule for Court-Martial (RCM) 104, make it unlawful for a convening authority to attempt to influence members of a court-martial on the outcome of the trial. This is an area in which a commander must exercise a great deal of care. There must be no appearance of unlawful command influence in the operation of the military justice system.

b. No commander can be effective unless able to influence his subordinates to successfully accomplish the mission. On the other hand, the UCMJ requires independence and prohibits "unlawful" command influence. Compliance with a few simple rules helps avoid unlawful command influence.

c. The commander may not order a subordinate to dispose of a case in a certain way. Each judicial authority, at every level, is vested with independent discretion, by law, which may not be impinged upon. There is no need to dictate dispositions to a lower level commander. However the commander may:

(1) Personally dispose of a case at the level authorized for that offense and for that commander or at any lower level.

(2) Send a case back to a lower commander for that lower commander's independent action.

(3) Send a case to a higher commander with a recommendation for disposition.

(4) Withdraw subordinate authority on a particular case or particular types of cases.

(5) Escalate a lower disposition, except an executed Article 15 for a minor crime, or after evidence is presented at trial.

(6) Rule of Court Martial 601(f) states, "Superior convening authorities, except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral."

(7) Mentor subordinates. While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command

control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them.

d. Watch out for:

(1) "Advice" before the offense (policy letters). A directive or policy that soldiers with two prior convictions be tried by General Court-Martial (GCM) is an unlawful interference with the subordinate's duty to exercise independent discretion. Guidelines on appropriate levels of disposition and punishment are inappropriate. An accused is entitled to have the immediate commander exercise independent discretion in the disposition of charges.

(2) "Advice" after the offense. For example, in one case a cryptic note on the blotter by the battalion commander that was received by the accused's company commander stated: "Need Comment 1 today. Process CM." The case was affirmed by appellate courts, but only because the company commander testified that he had "already decided" to recommend trial by court-martial.

e. The commander must not have an inflexible policy on disposition or punishment. As a judicial authority, the commander must consider each case individually on its own merits. If unable to do so, the power to act must be taken away.

f. No outside pressures may be placed on the judge or court members to arrive at a particular decision.

(1) Paragraph 5-10c, AR 27-10, Military Justice, states: "Quote:" "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . ."

(2) Bringing in command policy is improper. For example, in one case the U.S. Marine Corps Commandant made a speech about drugs at Quantico Marine Base during a recess of a drug trial. This speech resulted in a mistrial of the drug trial. In another case, the military judge's instruction during sentencing, relating to a command policy of generally not retaining those involved with illegal drugs, required reversal of the sentence.

(3) Evaluation reports. There is an absolute prohibition against evaluating the performance of duty of an individual as a member of a court-martial in preparing his efficiency report, or in determining his fitness for promotion, transfer, or retention in service.

g. Witnesses may not be intimidated or discouraged from testifying.

(1) Direct attempts to influence are prohibited. For example, in one case a commander's advice to a potentially favorable witness for the accused to modify his comments if possible, was held to be "inexcusable and highly improper." In another case, a commander counseled all defense witnesses about abuse of drugs two days before trial, approached defense witnesses in the witness waiting room on the day of trial, and expressed a desire that the accused get the maximum punishment. The appellate court found the commander's actions to be intolerable, inexcusable, and ordered a rehearing. In a third case, the chain of command briefed members of the command individually, and as a whole, before trial on the "bad character" of the accused. During trial the First Sergeant (1SG) "ranted and raved" outside the court room about NCOs condoning drug use. After trial, the NCOs who testified for the accused were told "that they had embarrassed" the unit. The Court of Military Appeals found unlawful command influence necessitated setting aside findings of guilty and the sentence.

(2) Indirect or unintended influence can be just as bad. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, despite good intentions.

(a) Before trial. In one case, the SJA briefed the crew of a ship on a pending court-martial. This briefing had potential for unlawfully influencing the outcome of trials. In another case, the Commanding General (CG) addressed groups of commanders and senior NCOs over a period of several months, discussing the inconsistency of recommending a GCM or Bad Conduct Discharge (BCD) Special Court and then having members of the chain of command testify that the accused was a "good soldier" and should be retained. The message received by many was "don't testify for convicted soldiers." These speeches resulted in unlawful command influence, and reversal of convictions and sentences.

(b) After trial. In one case, the commander and 1SG "debriefed" a defense witness after trial. The court found no prejudice in this accused's trial but stated: "The policy of 'lecturing' a defense witness, or any witness after they have testified, cannot help but have a chilling effect on our judicial system." In another case, when two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the timing of the relief caused potential witnesses to hesitate to testify in a companion or similar case.

h. Mass apprehension and pretrial punishment. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation was found to be unlawful command influence and unlawful punishment.

(1) The effect of improper pretrial punishment. In one case, Stamper, a soldier pending court-martial for larceny, was referred to by his company commander as "a thief." The company commander also remarked at formation that other soldiers should ensure their property was secure because Stamper was in the area. The commander asked Stamper several times whether he had received any "five-fingered discounts lately." Additionally, Stamper was required to sign-in past 2200, and every half hour on weekends, with the Charge of Quarters (CQ). The commander's actions were held to be improper because they were contrary to the presumption of innocence, and chilled potential defense witnesses. The restriction was unnecessarily restrictive. The appellate court ordered Stamper immediately released from confinement.

(2) Pretrial confinement is not pretrial punishment. The commander may confine those awaiting trial. Pretrial confinement is discussed in chapter 2 of this pamphlet.

i. The commander may not have an inflexible attitude towards clemency. The commander may approve or disapprove findings, and suspend and reduce sentences relating to court-martial and nonjudicial punishment. As a judicial appellate authority, the commander has a duty to impartially review military justice actions. An inflexible attitude towards clemency necessitates a loss of command/judicial authority.

(1) In one case the division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" The appellate courts determined that the convening authority was disqualified from performance of his review function. In another case, a general, who indicated that he could not understand how a battalion commander could allow a soldier to be court-martialed, and then testify at trial about the soldier's good character did not possess the requisite impartiality to perform the post-trial review function.

(2) Proper command influence. A commander's letter characterized illegal drugs as a "threat to combat readiness," reminded lower commanders that "detection and treatment of drug

abusers" should "be a primary goal," and stated that the drug problem would not be eliminated until drug trafficking ceased. He directed commanders to "work closely" with law enforcement officials "to ferret-out drug dealers;" to "consult with" appropriate "trial counsel before initiating any ... action against" drug dealers to ensure "appropriate legal action;" to educate troops regarding the effects of drugs; and to "personally screen the names of all court member nominees . . . to ensure that only the most mature officers and NCO's . . . [would be] detailed for court-martial duty."

j. If a mistake is made, raise the issue immediately. Remedial actions may be taken by the command or the judge. For example, in response to the 1SG's criticism of those who testify on behalf of drug offenders as contravention of Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses, and transferred the 1SG to eliminate his access to the rating process.

1-4. OPTIONS AVAILABLE TO THE COMMANDER. At every level of command, the commander has a number of available options with which to deal with a disciplinary problem. This paragraph concerns the various measures that can be taken in dealing with criminal offenses committed by a soldier.

a. Adverse administrative actions and eliminations. A commander may take, or initiate, administrative action whether or not charges have been or will be preferred, or have been dismissed. Contact the trial counsel to discuss available administrative options. An outline and discussion of the full range of administrative options available to a commander is contained in chapters 9-20 of this pamphlet.

b. Nonjudicial punishment. Punishment may be imposed under Article 15, UCMJ, for minor offenses. Article 15 punishment provides the commander with an efficient and prompt means of maintaining good order and discipline, while promoting positive behavior changes in soldiers, without the stigma of a court-martial conviction. A complete discussion of nonjudicial punishment is contained in chapter 7 of this guide.

c. Pretrial restraint. Pretrial restraint is moral or physical restraint on a soldier's liberty imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement. Most soldiers are not subject to any form of pretrial restraint while awaiting trial by courts-martial. The

decision whether to impose pretrial restraint, and if so, what type or types, should be made on a case-by-case basis. The restraint should not be more rigorous than the circumstances require to ensure the presence of the accused or to prevent foreseeable serious criminal misconduct. A complete discussion of pretrial restraint is contained in chapter 2 of this guide. Commanders should always coordinate with their supporting trial counsel prior to initiation of pretrial restraint.

d. Preferring court-martial charges. Any person subject to the UCMJ may prefer charges. A person cannot be ordered to prefer charges to which he is truthfully unable to make the required oath on his own responsibility. If a superior authority directs that charges be preferred, the superior authority becomes the accuser and, as such, is barred from convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he will ordinarily transmit the available information about the case to an officer of his command for preliminary inquiry and report, including, if appropriate, in the interest of justice and discipline, the preference of any charges which appear to be substantiated by the available evidence. If there is any doubt concerning whether preferral of charges is appropriate, the unit's supporting trial counsel should be consulted.

e Expeditious disposition of charges

(1) Expeditious handling. A commander must insist upon expeditious handling of charges by subordinates within his command. An unexplained delay in the administrative processing of charges by subordinate units may result in the dismissal of the charges due to a lack of speedy trial. Charges which progress through the chain of command, and do not properly allege offenses, must virtually start through the process again when the error is discovered. Such unnecessary delay can be avoided by the supporting trial counsel reviewing the charges prior to preferral.

(2) Determine whether the evidence supports charges. Regardless of how convinced a commander may be of a soldier's guilt, there will be no conviction if there is no evidence warranting trial. In this regard, a witness who is not credible is the same as no witness at all.

(3) Consider the individual soldier/accused. Remember that the administration of military justice involves individuals. You are not only dealing with a violation of the UCMJ, you are also dealing with an individual. As a commander, the option you

choose must fit the individual as well as the crime. Examine the background of the accused as well as the adjustment he has made in his unit. The court will consider these things, as should the commander.

f. Chapter 4 discusses dismissing charges and other disposition of offenses.

1-5. RESERVE CONSIDERATIONS. Reserve Component (RC) commanders encounter special problems with the administration of military justice. Chapter 8 of this guide deals with a number of RC considerations. Additionally, various chapters have specifically detailed provisions for the RC commander.